

CUMULATIVE DIGEST

Ch. 17

DOUBLE JEOPARDY - COLLATERAL ESTOPPEL

§17-1 [Generally](#)

§17-2 [When Jeopardy Attaches](#)

§17-3 [Dismissals and Mistrials](#)

§17-4 [Acquittals](#)

§17-5 [Reversals on Appeal](#)

§17-6 [Successive Prosecutions](#)

§17-7 [Dual Sovereignty](#) (currently no updates)

§17-8 [Increasing Punishment or Charge](#)

§17-9 [Forfeitures and Civil Sanctions](#) (currently no updates)

[Top](#)

§17-1

Generally

Yeager v. U.S., ___ U.S. ___, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009) (No. 08-67, 6/18/09)

1. Under **Ashe v. Swenson**, 397 U.S. 436 (1970), an issue of ultimate fact that has been determined by a valid and final judgment of acquittal cannot be relitigated in a second trial for a separate offense. To determine what issues the acquittal necessarily decided, courts should examine the entire record of the prior proceeding including the pleadings, evidence, charge, and other relevant material, to determine whether a rational jury could have grounded the acquittal on an issue other than that which the defendant seeks to foreclose from consideration in a second trial.

2. Where the defendant was acquitted of fraud in the first trial, but the jury could not reach a verdict on insider trading and money laundering counts, a second trial would be precluded only if the acquittal for wire fraud necessarily involved determination of an issue that was necessary to obtain a conviction on the remaining charges. The court stressed that only the issues required for the acquittal were in question – the jury’s inability to reach a verdict on some counts is a “nonevent” in terms of precluding issues from being considered at the second trial. In other words, “the consideration of hung counts has no place in the issue-preclusion analysis.”

3. Because the lower court did not consider whether the acquittal for fraud necessarily rested on an issue which would be required to convict at a second trial for inside trading and money laundering, the cause was remanded for further consideration.

People v. Hopkins, 235 Ill.2d 453, ___ N.E.2d ___ (2009) (No. 106683, 12/17/09)

Collateral estoppel bars relitigation of an issue which has been decided in a prior case, and applies when: (1) a party participates in two separate and consecutive cases arising from separate causes of action, and (2) some controlling fact or question material to determination of both causes has been adjudicated against that party in the former case by a court of competent jurisdiction. Collateral estoppel does not apply to multiple direct appeals after the cause has been remanded to the trial court – as there is but one cause of action.

Furthermore, the collateral estoppel doctrine requires a final judgment on the merits in the prior adjudication. There is no final judgment where a single cause of action is considered at different stages of the appellate process. (See also **APPEAL**, §2-6(a) & **SEARCH & SEIZURE**, §§44-4(b), 44-6(d)).

(Defendant was represented by Assistant Defender Doug Hoff, Chicago.)

People v. Runge, 234 Ill.2d 68, 917 N.E.2d 940 (2009)

“Judicial estoppel” is an equitable doctrine which can be invoked where the party to be estopped: (1) has taken factually inconsistent positions in separate judicial or *quasi* judicial proceedings, (2) intended for the trier of fact to accept the truth of the facts alleged, and (3) succeeded in receiving some benefit in the first proceeding. The “judicial estoppel” doctrine does not apply where a change in a party’s position is justified by new evidence which comes to light after the first proceeding was initiated. “[T]he justification for the implication of judicial estoppel is at best uncertain where a party changes its position after the previous proceedings due to the discovery of new evidence,” because the party which changed its position did not act in bad faith.

The “judicial estoppel” doctrine did not apply where the State filed and then withdrew a sexually violent persons petition, and subsequently claimed in a capital murder trial that defendant was capable of conforming his conduct to the law. (See also **JURY**, §32-5(a)).

People v. Anderson, 2013 IL App (2d) 121346 (No. 2–12-1346, 10/3/13)

Collateral estoppel bars litigation of an issue that has been fairly and completely resolved in a prior proceeding. The prerequisites to applying collateral estoppel are: (1) an identity of issues; (2) a final judgment on the merits in the prior proceeding; and (3) that the party against whom estoppel is asserted was a party, or is in privity with a party, in the prior proceeding. Even where these criteria are met, collateral estoppel should not be applied unless it is clear that doing so would not be unfair to the party to be estopped.

Where the prior proceeding is a summary suspension of a defendant’s driving privileges, there is a compelling policy reason against applying collateral estoppel. The legislature has directed that license suspension proceedings are to be swift and of limited scope. Giving suspension proceedings preclusive effect would undermine this legislative purpose. The practical effect would be to require live witness testimony rather than reliance on sworn police reports. The bar against reliance on collateral estoppel exists regardless of whether there was in fact a full and fair opportunity to litigate in the summary suspension proceeding, does not depend on the nature of the subsequent cause of action, and applies to both parties.

The circuit court rescinded the summary suspension of defendant’s driving privileges, finding that there was no probable cause for defendant’s arrest. In a prosecution of defendant for DUI, the court subsequently granted defendant’s motion to quash arrest and suppress evidence on the ground that defendant’s arrest was not supported by probable cause, based on the same evidence presented at the summary-suspension proceeding. After the motion was granted, the Appellate Court reversed the order of rescission, finding defendant’s arrest was supported by probable cause.

On appeal from the order granting the motion to suppress, the Appellate Court refused to reverse the trial court’s order granting the motion on the ground that the sole issue on the motion, probable cause to arrest, was decided adversely to defendant in the summary suspension appeal. The collateral estoppel doctrine was inapplicable where the prior action was a summary suspension proceeding. The Appellate Court did, however, find probable cause for defendant’s arrest based on the testimony of the arresting officer at the hearing on the motion to suppress.

People v. Brown, 2015 IL App (1st) 134049 (No. 1-13-4049, 6/22/15)

Defendant was prosecuted in separate trials on charges arising from a 2007 gun battle which defendant initiated with three persons. At the first trial, defendant was convicted of aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm for shooting at Terrell Spencer, and was also convicted of two counts of aggravated discharge of a firearm for shooting in the direction of Michael Dixon and Jarrett Swift. However, defendant was granted a directed verdict on charges of attempt murder, aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm relating to the shooting of Mycal Hunter, a bystander who was struck in the neck by a bullet. The trial court stated that there was insufficient evidence to show that defendant fired the shots which struck Hunter.

After the first trial was completed, Hunter died. Defendant was then tried for first degree murder based on two counts of knowing murder and five counts of felony murder

predicated on the five felony convictions which he received in the first trial for offenses committed against Spencer, Dixon and Swift.

The court rejected arguments that double jeopardy and collateral estoppel barred a trial for murder after defendant was acquitted in the first trial of offenses against the same person.

1. The Illinois and Federal constitutions provide that no person shall be put twice in jeopardy for the same offense. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Entry of a directed verdict is an “acquittal” for double jeopardy purposes where the basis for the verdict is insufficient evidence to establish some or all of the essential elements of the crime.

Illinois statutory law also provides that a prosecution is barred if the defendant was formerly prosecuted for the same offense based on the same facts and the prior prosecution resulted in an acquittal or a determination that the evidence was insufficient to warrant a conviction. 720 ILCS 5/3-4(a)(1). A prosecution for a different offense is barred where a former prosecution was for an offense that involved the same conduct unless each prosecution requires proof of a fact not required for the other or “the offense was not consummated when the former trial began.” 720 ILCS 5/3-4(b)(1).

The court held that §3-4(b)(1) embodies an exception to double jeopardy principles recognized in **Diaz v. United States**, 223 U.S. 442 (1912), where the United States Supreme Court found that a subsequent trial is permissible where at the time of the first trial, the prosecution could not have proceeded on the charge brought in the subsequent trial because additional facts necessary to sustain that charge had not yet occurred.

Because a murder prosecution cannot commence until the victim’s death has occurred, the court concluded that the **Diaz** exception and §3-4(b)(1) applied. Thus, double jeopardy was not violated where defendant was prosecuted for murder after the decedent’s death although he had been acquitted of related offenses at a trial which occurred while the decedent was still alive.

2. In a criminal context, collateral estoppel is a component of double jeopardy. The collateral estoppel doctrine holds that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a subsequent lawsuit. A party who seeks to invoke collateral estoppel must show that the issue was raised and litigated in a prior proceeding, determination of the issue was a critical and necessary part of the final judgment in that proceeding, and the issue sought to be precluded in the later trial is the same as the issue decided in the prior trial. Where the defendant claims that a previous acquittal bars a subsequent prosecution for a related offense, the collateral estoppel rule requires a court to examine the record of the prior proceeding and determine whether a rational jury could have grounded its verdict on an issue other than the one which the defendant seeks to foreclose from consideration.

A directed verdict in favor of the defendant constitutes an “acquittal” where the verdict was based on a finding that there was insufficient evidence concerning an essential element of the crime. Thus, the directed verdict in the first trial has preclusive effect under the collateral estoppel doctrine to the extent that it represented a determination that there was insufficient evidence to sustain an element of a charged offense.

Because intent to kill is an element of attempt murder, the directed verdict on attempt murder in the first trial precluded relitigation concerning whether defendant intended to kill the decedent. Thus, in the second trial the State was estopped from prosecuting defendant for intentional first degree murder.

The acquittal for attempt murder did not preclude a subsequent prosecution for first degree murder based on knowledge that the shooting created a strong probability of death or

great bodily harm. However, such charges could not be brought in the second trial because in the first trial, defendant was acquitted of charges (aggravated battery, aggravated battery of a firearm, and aggravated discharge of a firearm) which required a knowing mental state and which were directed toward Hunter. Because the acquittals on these offenses were based on the trial court's finding that there was insufficient evidence to show that defendant knowingly caused Hunter's injuries, the collateral estoppel doctrine precluded a subsequent prosecution for knowing murder.

However, the acquittals for attempt murder and offenses based on knowledge did not preclude a subsequent prosecution for felony murder predicated on the convictions obtained in the first trial against persons other than Hunter. Felony murder does not require a particular mental state, but only that the defendant was committing a forcible felony when he committed the acts which resulted in death. Furthermore, under the Illinois "proximate cause" theory, liability for felony murder attaches for any death which proximately results from unlawful activity initiated by the defendant, even if the killing was performed by the intended victim of the crime. Thus, where defendant was convicted of five felonies for initiating a shootout with individuals other than Hunter, and Hunter died in the course of those felonies, defendant could be prosecuted for felony murder whether or not he fired the shot which hit Hunter.

3. The court noted, however, that the single act of shooting Hunter could not support three separate felony murder convictions. The court vacated two counts of felony murder, affirmed the conviction for felony murder predicated on aggravated battery with a firearm directed against Spencer, and remanded the cause for re-sentencing.

People v. Cordero, 2012 IL App (2d) 101113 (No. 2-10-1113, 2/10/12)

The double jeopardy clause prohibits a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction, and multiple prosecutions for the same offense. However, double jeopardy protection is triggered only if there has been an event which terminates the original jeopardy from the first proceeding. The original jeopardy is not terminated where the jury fails to reach a verdict at the first trial, or the defendant is convicted but the trial court grants a new trial due to trial error:

[W]here the trial court sets aside a conviction, based on trial error, double jeopardy does not bar retrying the defendant – regardless of whether the evidence at the first trial was legally sufficient. Whatever the strength of the evidence at the original trial, the new trial cannot put the defendant in jeopardy for a *second* time – for the simple reason that he is still in jeopardy for the *first* time.

Where the defendant was convicted of aggravated sexual assault, but the trial court granted defendant's post-trial motion and ordered a new trial, the original jeopardy was not terminated. Therefore, a new trial would not subject the defendant to double jeopardy even if the evidence at the first trial was legally insufficient. Therefore, the trial court properly denied defendant's motion to dismiss the charge on the ground that the evidence presented at the first trial was insufficient to satisfy the reasonable doubt standard.

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

The collateral estoppel doctrine bars relitigation of an issue already decided in a prior case. The doctrine has three requirements: (1) the court rendered a final judgment in the prior case; (2) the party against whom the estoppel is asserted was a party or in privity with a party

in the prior case; and (3) the issue decided in the prior case is identical to the one represented in the instant case.

Erroneous judgments as well as correct ones are protected by the rule of collateral estoppel. The remedy for a legally incorrect or logically inconsistent decision is an appeal. The error, no matter how egregious, cannot be raised in a collateral proceeding.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

People v. Howard, 2014 IL App (1st) 122958 (No. 1-12-2958, 3/17/14)

1. The double jeopardy clause provides protection against: (1) a second prosecution after an acquittal; (2) a second prosecution after a conviction; and (3) multiple punishments for the same offense. If double jeopardy protection has attached, a defendant may not be subjected to a second prosecution after a court-decreed acquittal, even if the acquittal was based on erroneous grounds. Thus, double jeopardy has been held to prevent second prosecutions where acquittals were based on the court's mistaken understanding of the evidence necessary to sustain a conviction or the statute defining the requirements for a conviction.

2. Defendant was charged with unlawful possession of a controlled substance and four counts of unlawful use of a weapon for knowingly possessing firearms or firearm ammunition after having been convicted of a felony. (720 ILCS 5/24-1.1(a)). All of the UUW counts were based on the same prior felony conviction. Counts IV and VI were based on possession of a firearm, and Counts V and VII were based on possession of the ammunition inside that firearm.

Counts IV and V also contained a notice that, pursuant to 720 ILCS 5/24-1.1(e), the State would seek enhanced sentencing because at the time of the offense, defendant was on parole or mandatory supervised release. Section 24-1.1(e) provides that a violation of §24-1.1(a) by a person who is on parole or mandatory supervised release constitutes a Class 2 felony carrying a sentence of not less than two years or more than 14 years if a prison sentence is imposed.

At the end of the trial, the trial court entered an acquittal on Counts IV and V, finding that the State had failed to prove beyond a reasonable doubt that defendant was a parolee. At the sentencing hearing for the remaining counts, the State asked the trial judge to "revisit" the acquittal because defendant's status as a parolee was a sentencing enhancement that need not be proven at trial. The trial court agreed and "revised" its findings to enter convictions on all four UUW counts.

On appeal, the State conceded that double jeopardy principles prevented the trial court from "revisiting" the acquittals, and that the convictions on Counts IV and V must be vacated. The Appellate Court also concluded that on resentencing for the two counts of UUW on which the trial court had not entered acquittals, the trial court was precluded from imposing enhanced sentences based on defendant's parole status. The Appellate Court found that the trial court had acquitted defendant of the Class 2 offense of unlawful use of a weapon based on his status as a parolee, and that allowing the State to apply the same factor to the remaining counts would amount to a second prosecution even if the acquittal was based on a misunderstanding of the law.

The court stressed that it was not deciding whether the defendant's parole status is an "element" of Class 2 unlawful use of a weapon and, if so, whether that element must be proven at trial. Instead, the basis of the holding was that once the trial court entered an acquittal due to the State's failure to satisfy the reasonable doubt standard, the State was precluded from revisiting that issue for related counts of UUW on which acquittals had not been entered.

(Defendant was represented by Assistant Defender Michael Gomez, Chicago.)

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 (1st Dist. 2010)

Collateral estoppel is a bar to relitigation of a claim only where there is a mutuality of parties. The defendants could not use a prior judicial finding against the State where the finding was entered in a post-conviction proceeding and the defendants were not a party to that proceeding.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Ventsias, 2014 IL App (3d) 130275 (No. 3-13-0275, 7/1/14)

1. Double jeopardy precludes a second prosecution for the same offense after an acquittal or conviction. This protection only applies if the defendant was placed in jeopardy during the earlier proceedings, which depends on the point at which jeopardy attached. In a guilty plea proceeding, jeopardy attaches when the trial court accepts the guilty plea, and only attaches to the offenses to which defendant pled guilty. Additionally, double jeopardy does not bar reprosecution of a pled charge if the plea proceeding is later terminated for a proper reason.

2. Here, a jury convicted defendant of predatory criminal sexual assault, but acquitted him of aggravated criminal sexual abuse. On appeal, his conviction was reversed and remanded for a new trial. Prior to the new trial, the State and defendant entered a plea agreement where in exchange for defendant's guilty plea to the abuse charge, the State would nol pros the assault charge.

The court accepted defendant's plea after admonishing him that his reprosecution on the abuse charge would have been barred by double jeopardy. Pursuant to the plea agreement, the State nol-prossed the assault charge. But prior to sentencing, the court expressed concerns about the propriety of defendant pleading guilty to the abuse charge. In response, the State moved to vacate the guilty plea. At a hearing on the State's motion, defendant said he no longer wanted to plead guilty. The court vacated the plea and reinstated the assault charge. Following a trial, defendant was convicted of the assault charge.

3. On appeal, defendant argued that double jeopardy barred his second trial on the assault charge. Defendant argued that jeopardy had attached to and he had been acquitted of the assault charge when the State nol-prossed the charge after defendant pled guilty to the abuse charge. Defendant further argued that the trial court improperly vacated the guilty plea to the abuse charge since defendant validly waived his double jeopardy rights to that charge.

4. The Appellate Court rejected defendant's arguments and held that double jeopardy did not bar retrial on the assault charge. Jeopardy never attached to the assault charge at the plea hearing because defendant never pled guilty to that charge. Instead, the State simply nol-prossed that charge.

Even if jeopardy had attached to the assault charge, the trial court properly vacated the plea when it realized defendant could not enter a valid plea to the abuse charge since he had been acquitted of that charge. A defendant cannot validly waive the double jeopardy bar on reprosecution following an acquittal.

Defendant's conviction on the assault charge was affirmed.

People v. Villafuerte-Medrano, 2012 IL App (2d) 110773 (No. 2-11-0773, 12/19/12)

1. An order is "void" if entered by a court which lacks jurisdiction or which exceeds its jurisdiction by entering an order beyond its inherent power. An order is void only where jurisdiction is lacking.

By contrast, an order erroneously entered by a court which has jurisdiction is merely "voidable." Once jurisdiction is acquired, it is not lost because the court makes a mistake in

determining the facts, the law, or both.

2. Where the court has subject matter and personal jurisdiction, it is not divested of jurisdiction because it accepts a guilty plea which violates double jeopardy. Thus, a conviction based on such a plea is voidable rather than void. To raise a double jeopardy challenge to such a plea, the defendant is required to file a timely motion to withdraw the plea. Otherwise, the entry of the guilty plea waives the double jeopardy challenge.

3. The court acknowledged that under federal constitutional law, a guilty plea does not waive a double jeopardy challenge where the double jeopardy violation can be established on the face of the charge. The court concluded that even in that case, however, the defendant must preserve the issue on appeal. In other words, a court may not review a double jeopardy claim that has not been preserved for appeal.

Thus, the conviction based on defendant's guilty plea was voidable rather than void. Because defendant failed to file a timely motion to withdraw the plea, the court could not consider the claim that the conviction violated double jeopardy.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Wright, 2013 IL App (4th) 110822 (No. 4-11-0822, 4/17/13)

Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have been previously litigated and decided in an action involving the same parties or their privies.

On direct appeal, the Appellate Court found that the trial court's isolated mention of an invalid aggravating factor was not plain error because defendant's sentencing hearing was fair despite the error.

That finding collaterally estopped defendant from claiming in a post-conviction petition that trial and appellate counsel were ineffective for failing to preserve and fully brief the error. Defendant could succeed on those claims only if counsels' deficient performance caused him prejudice. Defendant suffered no prejudice if his sentencing hearing was fair.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Young, 2013 IL App (1st) 111733 (No. 1-11-1733, 12/6/13)

In 2004, defendant entered fully negotiated guilty pleas to first degree murder and attempt murder and received negotiated consecutive sentences of 25 and 10 years. In 2011, defendant's post-conviction petition alleging ineffective assistance of trial counsel was denied after a third-stage hearing. On appeal, defendant argued for the first time that his sentences were void because they did not include the mandatory statutory firearm enhancement of 20 years for personally discharging a firearm or 25 years to natural life if great bodily harm resulted from discharging a firearm. Defendant argued that he should be allowed to withdraw his plea and plead anew.

The court concluded that defendant was estopped from challenging the sentence because it had been freely negotiated and provided him with a benefit in that he received a far lower sentence than was required under the law. The court also stressed that the State would be disadvantaged at a trial by the passage of time and the possible unavailability of witnesses to testify.

The doctrine of judicial estoppel applies where a party takes inconsistent positions in separate judicial or quasi-judicial proceedings, intended that the trier of fact accept the truth of the facts alleged at the prior hearing, and succeeded in asserting the first position and consequently receiving some benefit. The court acknowledged that Illinois courts have never applied judicial estoppel where criminal defendants entered a fully negotiated plea agreement

and then challenged the sentence as too lenient. However, courts from other jurisdictions have recognized that the State is prejudiced under similar circumstances where a guilty plea is vacated years after it was entered, and have estopped defendants from enjoying the benefits of a negotiated plea agreement while challenging its validity.

Here, defendant voluntarily entered a plea calling for negotiated sentences totaling 35 years, and nearly ten years later claimed that the sentences should have been at least 76 years. The court concluded that the doctrine of judicial estoppel applied because the State could not be restored to its original position in that witnesses may have become unavailable for trial. The court also noted that defendant did not allege that any fraud or misrepresentation had occurred in the original plea agreement.

The court concluded:

Defendant has not cited, nor has our research disclosed an Illinois case in which a defendant has been permitted to withdraw his plea entered nearly a decade earlier and some 13 years after the offenses occurred, because the sentence was not harsh enough. It defies logic to suggest that defendant actually wants to serve a longer prison sentence than the improper sentence he received. . . . Rather, defendant . . . is using the improper sentence as a vehicle to withdraw his guilty plea, 10 years after its entry, and go to trial. Defendant's belated challenge could harm the State because it might endure hardship if forced to prosecute the case, given the passage of time and the recollection of witnesses.

The order denying the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

[Top](#)

§17-2

When Jeopardy Attaches

Martinez v. Illinois, ___ U.S. ___, ___ S.Ct. ___, ___ L.E2d ___ (2014) (No. 13-5967, 5/27/14)

1. For purposes of the double jeopardy clause, jeopardy attaches when the jury is empaneled and sworn. **Crist v. Bretz**, 437 U.S. 28 (1978). The Illinois Supreme Court erred by finding that jeopardy attaches with the swearing of the jury only if, based on the facts of the particular case, the defendant is “at risk of conviction.” Instead, **Bretz** established a “bright-line” which precludes the sort of case-by-case approach adopted by the Illinois Supreme Court.

Thus, at defendant's trial for aggravated battery and mob action, jeopardy attached when the jury was sworn although the State refused to make an opening statement or present witnesses.

2. Once jeopardy has attached, the entry of an acquittal implicates the double jeopardy clause and bars a second trial. An “acquittal” is defined as any ruling that the prosecution's evidence is insufficient to establish criminal liability for an offense. Whether a defendant has been acquitted is determined not by the form of the judge's action, but by whether the ruling, whatever its label, represents a resolution of some or all of the factual elements of the crime.

After obtaining several continuances to find two witnesses, the prosecution declined to participate in defendant's trial. Defense counsel moved for directed findings of not guilty on

both counts, and the trial court granted the motion. Under these circumstances, the ruling constituted a “textbook acquittal” because it was “a finding that the State’s evidence [could not] support a conviction.” Because an acquittal was entered after jeopardy had attached, a second trial was barred.

This result did not change because the State informed the court before the jury was sworn (but after *voir dire*) that it did not intend to participate in the trial. The trial judge had repeatedly granted continuances so the State could attempt to find its witnesses, and on the day of trial conducted *voir dire* but delayed swearing the jury to give the State more time. Furthermore, before the jury was sworn the trial judge told the prosecutor that the State could move to dismiss the case, which would not have implicated the double jeopardy clause. Instead, the State participated in the selection of jurors, failed to seek dismissal before the jury was sworn, and elected not to participate in the trial. Under these circumstances, fairness to the prosecution and the public does not require modification of the bright-line rule that jeopardy attaches when the jury is sworn.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Martinez, 2013 IL 113475 (No. 113475, 4/18/13)

To trigger the protections of the double jeopardy clause, there must first be an attachment of jeopardy. Generally, in a jury trial, jeopardy attaches when a jury is empaneled and sworn. But in assessing whether jeopardy has attached, rules should not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society’s interest in enforcing its criminal laws. The overriding inquiry should be whether the defendant was actually in danger or at risk of being found guilty of any offense.

The State participated in jury selection after the court denied the State’s oral motion for a continuance of the trial because two of its witnesses were not present. Before the jury was sworn, the State presented a written motion for a continuance. When the court denied that motion, the State indicated it would not participate any further in the proceedings. The jury was sworn, the State declined to present any evidence, and the court granted the defense motion for a directed acquittal.

Under the “unique set of facts presented here,” the Illinois Supreme Court held that jeopardy did not attach when the jury was sworn. Defendant was never at risk of a conviction when the State indicated it would not participate before the jury was sworn. The defendant’s interest in retaining a chosen jury was not implicated where there was no trial to be completed by that tribunal. Because defendant was not placed in jeopardy, there was no true acquittal.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Cabrera, 402 Ill.App.3d 440, 932 N.E.2d 528 (1st Dist. 2010)

The double jeopardy clause bars a second prosecution for the same offense after conviction, as well as multiple punishments for the same offense.

The court accepted defendant’s negotiated plea of guilty to a charge of armed robbery and the prosecution nol-prosed the remaining counts. Before the court imposed the agreed sentence, the court *sua sponte* vacated the plea, over defendant’s objection, when the defendant indicated that he was innocent. The defendant was subsequently tried and convicted on all counts and received a term of imprisonment substantially greater than his agreed sentence. On direct appeal, the Appellate Court found that the circuit court did not err in vacating the plea due to defendant’s claim of innocence. Defendant then filed a post-conviction petition alleging a double jeopardy violation occurred when he was tried following

his guilty plea.

1. The Appellate Court held that reinstatement of the nolle charges was not barred by double jeopardy as jeopardy attached at the plea hearing only to the charge to which defendant pleaded guilty.

2. With respect to the armed robbery charge, the Appellate Court agreed that jeopardy attached when the court accepted defendant's plea of guilty. Defendant's guilty plea did not bar his subsequent trial, however, because jeopardy did not terminate. The court recognized that application of the principle of continuing jeopardy to a guilty plea hearing was an issue of first impression. Citing 720 ILCS 5/3-4(a)(3), the court held that a prosecution is not barred if a former prosecution terminated properly. Because courts may reject a guilty plea where a defendant claims innocence, courts can exercise sound discretion to reject a guilty plea where a defendant claims innocence. Because termination of the guilty plea proceeding was proper, double jeopardy did not bar the subsequent prosecution of defendant.

The court affirmed the dismissal of the post-conviction petition.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Guillen, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The trial court was in the process of accepting defendant's guilty plea and determining what sentence to impose (more or less at the same time), when the State decided that it had charged the wrong offense. The court allowed the State to *nolle pros* the current charges over defendant's objection.

When the State brought new charges, defendant moved to dismiss them on double jeopardy grounds, arguing before a new judge that the prior judge had implicitly accepted the guilty plea by discussing sentencing factors and thus jeopardy had attached. The new judge agreed and dismissed the charges.

The State appealed the trial court's dismissal. Defendant was not represented by counsel on appeal and filed no appellate brief responding to the State's arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split three ways on the rationale for doing so with no controlling opinion. The court decided 2-1 to reverse the trial court, again with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee's brief; or (3) the court may reverse the judgment below if the appellant's brief demonstrates *prima facie* reversible error and the record supports the appellant's contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court. Writing for herself alone, she selected the second **Talandis** option and determined that the trial court had improperly dismissed the charges on double jeopardy grounds.

Double jeopardy is violated by a second proceeding when the defendant was placed in jeopardy during the first proceeding and the first proceeding was improperly terminated. When the State *nol prosses* charges, a second prosecution is permitted if the *nol pros* occurred before jeopardy attached. If the *nol pros* occurs after jeopardy has attached, the *nol pros* generally acts as an acquittal that bars further prosecution.

In a guilty plea, jeopardy attaches when the court accepts the plea, but Illinois law has not clearly defined the point when a guilty plea has been accepted. In particular, the Illinois

Supreme Court has not decided whether a trial court has accepted a plea when it has begun to accept the plea but then vacates the plea during the same hearing.

Substantial authority from other jurisdictions, however, suggests that a plea is accepted only when the trial court unconditionally accepts the plea. Thus, a trial court may vacate a guilty plea if it becomes aware of facts counseling against the plea, so long as the plea has not been accepted in a final and unconditional manner.

Based on these principles, Justice Schostok found that jeopardy had not attached when the State *nol prossed* the charges. Although defendant indicated that he wished to plead guilty, and the court admonished him about some of the consequences of his plea and began considering sentencing matters, other aspects of plea acceptance were not present here. The parties still had not agreed on the minimum punishment defendant faced and the State had not presented a factual basis. The plea hearing thus had not concluded when the State *nol prossed* the charges. Any acceptance of the plea was preliminary rather than unconditional.

Even if jeopardy had attached, the prosecution was not improperly terminated. During the plea hearing, both the State and the court realized that defendant had been improperly charged. The State's decision to *nol pros* the charges thus was not for an improper purpose and the court could properly terminate the plea proceedings, vacate the plea, and grant the State's motion without violating double jeopardy.

The trial court's dismissal of the charges was reversed.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok's use of the second **Talandis** option. Instead, Justice Zenoff selected the third **Talandis** option and determined that the appellant's brief showed *prima facie* reversible error.

The State argued that Supreme Court Rule 402 requires the trial court to comply certain formalities before accepting a plea. The record showed that the court did not comply with those formalities and thus the State argued that the trial had not yet accepted defendant's plea. Justice Zenoff found that this argument made a *prima facie* showing that no double jeopardy violation occurred here. Under the third **Talandis** option, that was enough to reverse the trial court's dismissal.

3. Justice Hudson dissented from the judgment reversing the trial court. He selected the first **Talandis** option and, acting as an advocate for defendant, would have found that the trial court properly dismissed the charges on double jeopardy grounds. The record showed that the trial court was beginning to pronounce sentence and therefore had already accepted the guilty plea. Jeopardy had thus attached and the trial court properly dismissed the new charges on double jeopardy grounds.

People v. Martinez, 2011 IL App (2d) 100498 (No. 2-10-0498, 10/5/11)

Whether jeopardy attached is decided based on whether defendant was placed at risk of a determination of guilt, not by mechanical application of a rule of thumb, such as whether the jury was empaneled and sworn. Jeopardy does not attach even where evidence is produced if the evidence does not inculcate the defendant.

The "acquittal" entered by the trial court was in fact a dismissal. A jury was sworn and given preliminary instructions. But before the jury was sworn, the State unsuccessfully moved for a continuance, and indicated that it would not participate in the trial as its material witnesses were absent. The court ultimately granted the defense motion for a directed finding after no evidence was presented. As there was no risk of a determination of guilt, jeopardy had not attached.

It was irrelevant that the State reneged on its agreement to the court's proposal that

the jury be selected and that the State then decide, before the jury was sworn, whether to dismiss the charges or proceed with the prosecution, or that the State never moved to *nol-pros* the charges. Nor did it matter that the court did not intend that a sham trial occur. It only matters that the trial proceedings had not matured to the point that defendant was at risk of a conviction because no witnesses were sworn and the State presented no evidence.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Ventsias, 2014 IL App (3d) 130275 (No. 3-13-0275, 7/1/14)

1. Double jeopardy precludes a second prosecution for the same offense after an acquittal or conviction. This protection only applies if the defendant was placed in jeopardy during the earlier proceedings, which depends on the point at which jeopardy attached. In a guilty plea proceeding, jeopardy attaches when the trial court accepts the guilty plea, and only attaches to the offenses to which defendant pled guilty. Additionally, double jeopardy does not bar reprosecution of a pled charge if the plea proceeding is later terminated for a proper reason.

2. Here, a jury convicted defendant of predatory criminal sexual assault, but acquitted him of aggravated criminal sexual abuse. On appeal, his conviction was reversed and remanded for a new trial. Prior to the new trial, the State and defendant entered a plea agreement where in exchange for defendant's guilty plea to the abuse charge, the State would nol pros the assault charge.

The court accepted defendant's plea after admonishing him that his reprosecution on the abuse charge would have been barred by double jeopardy. Pursuant to the plea agreement, the State nol-prossed the assault charge. But prior to sentencing, the court expressed concerns about the propriety of defendant pleading guilty to the abuse charge. In response, the State moved to vacate the guilty plea. At a hearing on the State's motion, defendant said he no longer wanted to plead guilty. The court vacated the plea and reinstated the assault charge. Following a trial, defendant was convicted of the assault charge.

3. On appeal, defendant argued that double jeopardy barred his second trial on the assault charge. Defendant argued that jeopardy had attached to and he had been acquitted of the assault charge when the State nol-prossed the charge after defendant pled guilty to the abuse charge. Defendant further argued that the trial court improperly vacated the guilty plea to the abuse charge since defendant validly waived his double jeopardy rights to that charge.

4. The Appellate Court rejected defendant's arguments and held that double jeopardy did not bar retrial on the assault charge. Jeopardy never attached to the assault charge at the plea hearing because defendant never pled guilty to that charge. Instead, the State simply nol-prossed that charge.

Even if jeopardy had attached to the assault charge, the trial court properly vacated the plea when it realized defendant could not enter a valid plea to the abuse charge since he had been acquitted of that charge. A defendant cannot validly waive the double jeopardy bar on reprosecution following an acquittal.

Defendant's conviction on the assault charge was affirmed.

[Top](#)

§17-3

Dismissals and Mistrials

Renico v. Lett, ___ U.S. ___, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (No. 09-338, 5/3/10)

1. Where under all of the circumstances there was a “manifest necessity” for a mistrial in a previous trial, the Double Jeopardy clause does not bar a retrial. The “manifest necessity” standard is not to be interpreted literally; “a mistrial is appropriate where there is a ‘high degree’ of necessity.”

Whether to grant a mistrial is left to the broad discretion of the trial court, whose decision is entitled to “great deference” unless the judge failed to exercise discretion or acted for reasons completely unrelated to the problem which purported to be the reason for the mistrial. A trial judge who orders a mistrial is not required to make explicit findings concerning manifest necessity, or to articulate on the record the factors which led to the belief that a mistrial was necessary.

2. See also, **COLLATERAL REMEDIES**, §9-5(a).

People v. Bennett, 2013 IL App (1st) 121168 (No. 1-12-1168, 7/3/13)

Where the defendant rather than the State moves for a mistrial, the defendant is deemed to have deliberately chosen to forgo his valued right to have his guilt or innocence determined before the first trier of fact. Double jeopardy bars retrial only when the prosecutor actually intends to goad the defense into moving for a mistrial, a rare circumstance. A prosecutor’s harassment, overreaching, or bad faith does not suffice. A trial court’s ruling that a prosecutor did not intend to cause a defendant to seek a mistrial is reviewed for an abuse of discretion.

The trial court did not abuse its discretion in finding that the prosecutor did not intend to force the defense to request a mistrial. The defendant’s argument that the prosecutor acted intentionally in eliciting inadmissible testimony to gain unfair advantage over the defense, even if accepted, provided an insufficient basis to bar retrial. While the prosecutor’s conduct was sufficient to justify declaring a mistrial on defendant’s motion, nothing supported the conclusion that the prosecutor intended to subvert the protections afforded by the Double Jeopardy Clause.

[Top](#)

§17-4

Acquittals

Blueford v. Arkansas, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2012 WL 1868066 (No. 10-1320, 5/24/12)

The double jeopardy clause guarantees that the State shall not be permitted to make repeated attempts to convict the accused following an acquittal.

The trial court instructed the jury on the charge of capital murder and three lesser offenses: first-degree murder, manslaughter and negligent homicide. The jury was directed to first consider the capital murder charge and then consider each lesser charge in turn only after deciding that it had a reasonable doubt of defendant’s guilt of the greater charge. The jury was provided with a guilty verdict form for each charge and a general verdict form of not guilty.

After the jury reported that it was unable to reach a verdict, the court asked the foreperson to disclose the jury’s votes on each offense. The foreperson disclosed that the jury was unanimous against the capital murder and first-degree murder charges, was split 9-3 on the manslaughter charge, and had not voted on the negligent homicide charge in accordance

with its instructions that it should consider that charge only after finding a reasonable doubt as to the greater charges. The court instructed the jury to continue to deliberate, denying the defense request that the jury be given verdict forms for the counts on which it had reached agreement. Ultimately, the court declared a mistrial and discharged the jury without any verdict being returned.

The Supreme Court held that the double jeopardy clause did not bar retrial on the charges of capital murder and first-degree murder.

1. Because the jury had not ended its deliberations at the time that it reported its agreement against those charges, that report lacks the finality necessary to constitute an acquittal on the murder offenses. Nothing prohibited the jury from reconsidering its vote when it resumed its deliberations. That lack of finality distinguishes this case from **Green v. United States**, 355 U.S. 184 (1957), and **Price v. Georgia**, 398 U.S. 323 (1970), which held that a defendant tried on a greater offense and convicted of a lesser offense cannot be retried on the greater offense.

2. The jury's inability to reach a verdict provided a manifest necessity for declaration of the mistrial. The court's refusal to allow the jury an opportunity to give effect to its votes against the murder charges by providing additional verdict forms was not an abuse of discretion. "We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."

Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissented. The majority's decision misapplies two longstanding principles. First, an acquittal occurs if a jury's decision, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. Second, a trial judge may not defeat a defendant's entitlement to the verdict of a tribunal he might believe to be favorably disposed to his fate by declaring a mistrial before deliberations end, absent a defendant's consent or a manifest necessity to do so.

Because state law requires that the jury acquit the defendant of the greater offense before considering his guilt on the lesser offense, the forewoman's announcement in open court that the jury was unanimous against conviction on the murder charges was an acquittal for double jeopardy purposes. This case is stronger than **Green** or **Price** because the jury was not silent on the murder counts. Nothing indicates that the jury reconsidered its decision, and nothing in its instructions allowed it to reconsider its decision.

There was no manifest necessity for declaration of a mistrial on the murder charges. Unlike a case where there is a genuine inability to reach a verdict, under the procedure adopted by Arkansas, a jury that advances to consideration of lesser offenses has not demonstrated an inability to reach a verdict on the greater offenses – it has acquitted on the greater. Therefore, the trial judge should have honored the defense request to allow the jury to return a partial verdict.

Evans v. Michigan, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 11-1327, 2/20/13)

At a trial for arson based on burning "other real property," the State's evidence showed that defendant burned an unoccupied house. At the close of the State's case, the trial court granted defendant's motion for a directed verdict on the ground that the statute creating the offense required that the building not be a "dwelling house." The court concluded that the burned building was a "dwelling house" and therefore not covered by the statute.

On appeal, the parties agreed that under Michigan law, burning "other real property" is a lesser included offense of the separate offense of burning a dwelling house. Furthermore,

the essential elements of arson of “other real property” do not include the fact that the structure is not a dwelling house. Because it was undisputed that the trial court misunderstood the elements of the offense and erred by directing a verdict, the Michigan Court of Appeals reversed the trial court’s order and held that the Double Jeopardy Clause did not bar retrial.

The United States Supreme Court reversed.

1. The Double Jeopardy Clause bars retrial following an acquittal, even if the acquittal is ordered by the trial court rather than returned by the jury and even if it is based on an erroneous foundation. Thus, double jeopardy principles bar retrial even if the acquittal was based on an erroneous decision to suppress evidence, a mistaken understanding of the evidence needed to convict, or a misunderstanding of the statute defining the offense.

The court distinguished acquittals from procedural rulings such as dismissals and mistrials, which are unrelated to factual guilt or innocence, carry no expectation of finality, and in many cases permit a retrial. The law attaches special significance to acquittals, by contrast, because “[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent he may be found guilty.’”

2. The trial court clearly granted an “acquittal,” as its ruling was based not on a procedural ground but on the judge’s belief that the State had failed to carry its burden of proof. Although the judge’s ruling was wrong and based on a misunderstanding of the elements of the offense, that misunderstanding means only that the decision to acquit was erroneous. The essential character of the acquittal was not affected by the fact that it had an erroneous basis.

The court rejected the argument that an acquittal can occur only if an actual element of the offense has been resolved against the State, and that an “acquittal” therefore cannot be based on a misinterpretation of the elements of the crime. The court stressed that an “acquittal” involves a determination that a defendant is not criminally culpable for an offense, without regard to whether that determination concerns an element of the crime.

3. The court declined to reconsider its precedent concerning the double jeopardy aspects of erroneously entered acquittals. The court found that there was no showing that its existing precedent was unworkable, and that the logic of the precedent still applies. The court also stated that states may elect to deny trial courts the power to grant a mid-trial acquittal, noting that at least two states have done so and that other jurisdictions encourage courts to defer consideration of motions for directed verdict until after the jury has returned its verdict. “But having chosen to vest its courts with the power to grant mid-trial acquittals, the State must bear the corresponding risk that some acquittals will be granted in error.”

Martinez v. Illinois, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed2d ___ (2014) (No. 13-5967, 5/27/14)

1. For purposes of the double jeopardy clause, jeopardy attaches when the jury is empaneled and sworn. **Crist v. Bretz**, 437 U.S. 28 (1978). The Illinois Supreme Court erred by finding that jeopardy attaches with the swearing of the jury only if, based on the facts of the particular case, the defendant is “at risk of conviction.” Instead, **Bretz** established a “bright-line” which precludes the sort of case-by-case approach adopted by the Illinois Supreme Court.

Thus, at defendant’s trial for aggravated battery and mob action, jeopardy attached when the jury was sworn although the State refused to make an opening statement or present witnesses.

2. Once jeopardy has attached, the entry of an acquittal implicates the double jeopardy clause and bars a second trial. An “acquittal” is defined as any ruling that the prosecution’s evidence is insufficient to establish criminal liability for an offense. Whether a defendant has been acquitted is determined not by the form of the judge’s action, but by whether the ruling, whatever its label, represents a resolution of some or all of the factual elements of the crime.

After obtaining several continuances to find two witnesses, the prosecution declined to participate in defendant’s trial. Defense counsel moved for directed findings of not guilty on both counts, and the trial court granted the motion. Under these circumstances, the ruling constituted a “textbook acquittal” because it was “a finding that the State’s evidence [could not] support a conviction.” Because an acquittal was entered after jeopardy had attached, a second trial was barred.

This result did not change because the State informed the court before the jury was sworn (but after *voir dire*) that it did not intend to participate in the trial. The trial judge had repeatedly granted continuances so the State could attempt to find its witnesses, and on the day of trial conducted *voir dire* but delayed swearing the jury to give the State more time. Furthermore, before the jury was sworn the trial judge told the prosecutor that the State could move to dismiss the case, which would not have implicated the double jeopardy clause. Instead, the State participated in the selection of jurors, failed to seek dismissal before the jury was sworn, and elected not to participate in the trial. Under these circumstances, fairness to the prosecution and the public does not require modification of the bright-line rule that jeopardy attaches when the jury is sworn.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Martinez, 2013 IL 113475 (No. 113475, 4/18/13)

To trigger the protections of the double jeopardy clause, there must first be an attachment of jeopardy. Generally, in a jury trial, jeopardy attaches when a jury is empaneled and sworn. But in assessing whether jeopardy has attached, rules should not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society’s interest in enforcing its criminal laws. The overriding inquiry should be whether the defendant was actually in danger or at risk of being found guilty of any offense.

The State participated in jury selection after the court denied the State’s oral motion for a continuance of the trial because two of its witnesses were not present. Before the jury was sworn, the State presented a written motion for a continuance. When the court denied that motion, the State indicated it would not participate any further in the proceedings. The jury was sworn, the State declined to present any evidence, and the court granted the defense motion for a directed acquittal.

Under the “unique set of facts presented here,” the Illinois Supreme Court held that jeopardy did not attach when the jury was sworn. Defendant was never at risk of a conviction when the State indicated it would not participate before the jury was sworn. The defendant’s interest in retaining a chosen jury was not implicated where there was no trial to be completed by that tribunal. Because defendant was not placed in jeopardy, there was no true acquittal.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Cervantes, 2013 IL App (2d) 110191 (No. 2-11-0191, 6/11/13)

The constitutional bar against double jeopardy protects against: (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

An acquittal includes any ruling that relates to the ultimate question of guilt or innocence, as opposed to a procedural ruling unrelated to guilt or innocence that results in dismissal. Whether the acquittal was the product of an erroneous interpretation of law or fact affects only the accuracy of the determination to acquit, not its essential character. The issue is only whether the bottom-line question of culpability was resolved. **Evans v. Michigan**, 568 U.S. ___, 133 S. Ct. 1069, ___ L.Ed.2d ___ (2013). The Illinois Supreme Court also requires that the acquittal be unequivocal for jeopardy to terminate, but **Evans** contains no similar requirement. The double-jeopardy clause in the state constitution is interpreted in the same manner as the federal constitution.

After a bench trial, the court found defendant not guilty of possession of a controlled substance with intent to deliver but guilty of simple possession. The court then found the defendant not guilty of armed violence based on its mistaken belief that the armed violence charge was predicated on the controlled substances charge for which it had acquitted the defendant. The prosecutor asked to clarify the ruling, pointing out that the armed violence charge was based on the simple possession charge for which defendant had been convicted. Acknowledging its error, the court entered a written order a week later finding defendant guilty of armed violence.

The court's misreading of the indictment led it to find defendant not guilty due to the State's failure to prove an element that was not an element of the offense. This ruling constituted an acquittal even though erroneous because it was based on guilt or innocence rather than a procedural ground unrelated to guilt or innocence. Assuming that the threshold requirement that the acquittal be unequivocal survives **Evans**, it was met in this case where the court unhesitatingly found defendant not guilty. Once jeopardy terminated with the court's entry of an acquittal, the double jeopardy clause prohibited the court from placing defendant in jeopardy a second time by reconsidering its finding.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Clark, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)

The Illinois Constitution bars an appeal from a judgment of acquittal even where the court's ruling was based on a mistake of fact or law. Similarly, the double jeopardy clauses of the United States and Illinois Constitutions preclude retrial after an acquittal due to insufficient evidence, without regard to whether the court erred in evaluating the evidence or the decision flowed from an incorrect ruling of law. A judgement constitutes an acquittal where it actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

Here, defendant was charged with aggravated vehicular hijacking while armed with a firearm and armed robbery while armed with a firearm. At the close of trial, the judge stated that he found defendant "guilty of aggravated vehicular hijacking and armed robbery without a firearm." The basis of the ruling was that the defendant had been armed with a firearm but used the weapon only as a bludgeon.

The court concluded that the defendant was acquitted by the trial court's ruling. The court also noted that where there is a conflict between the oral pronouncement of a court and a written order, the oral pronouncement controls. Thus, defendant was acquitted by the judge's oral statement although the written sentencing order stated that defendant had been convicted of vehicular hijacking with a firearm and armed robbery with a firearm.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Martinez, 2011 IL App (2d) 100498 (No. 2-10-0498, 10/5/11)

Whether jeopardy attached is decided based on whether defendant was placed at risk of a determination of guilt, not by mechanical application of a rule of thumb, such as whether the jury was empaneled and sworn. Jeopardy does not attach even where evidence is produced if the evidence does not inculcate the defendant.

The “acquittal” entered by the trial court was in fact a dismissal. A jury was sworn and given preliminary instructions. But before the jury was sworn, the State unsuccessfully moved for a continuance, and indicated that it would not participate in the trial as its material witnesses were absent. The court ultimately granted the defense motion for a directed finding after no evidence was presented. As there was no risk of a determination of guilt, jeopardy had not attached.

It was irrelevant that the State reneged on its agreement to the court’s proposal that the jury be selected and that the State then decide, before the jury was sworn, whether to dismiss the charges or proceed with the prosecution, or that the State never moved to *nol-pros* the charges. Nor did it matter that the court did not intend that a sham trial occur. It only matters that the trial proceedings had not matured to the point that defendant was at risk of a conviction because no witnesses were sworn and the State presented no evidence.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Ventsias, 2014 IL App (3d) 130275 (No. 3-13-0275, 7/1/14)

1. Double jeopardy precludes a second prosecution for the same offense after an acquittal or conviction. This protection only applies if the defendant was placed in jeopardy during the earlier proceedings, which depends on the point at which jeopardy attached. In a guilty plea proceeding, jeopardy attaches when the trial court accepts the guilty plea, and only attaches to the offenses to which defendant pled guilty. Additionally, double jeopardy does not bar reprosecution of a pled charge if the plea proceeding is later terminated for a proper reason.

2. Here, a jury convicted defendant of predatory criminal sexual assault, but acquitted him of aggravated criminal sexual abuse. On appeal, his conviction was reversed and remanded for a new trial. Prior to the new trial, the State and defendant entered a plea agreement where in exchange for defendant’s guilty plea to the abuse charge, the State would *nol pros* the assault charge.

The court accepted defendant’s plea after admonishing him that his reprosecution on the abuse charge would have been barred by double jeopardy. Pursuant to the plea agreement, the State *nol-pros*ed the assault charge. But prior to sentencing, the court expressed concerns about the propriety of defendant pleading guilty to the abuse charge. In response, the State moved to vacate the guilty plea. At a hearing on the State’s motion, defendant said he no longer wanted to plead guilty. The court vacated the plea and reinstated the assault charge. Following a trial, defendant was convicted of the assault charge.

3. On appeal, defendant argued that double jeopardy barred his second trial on the assault charge. Defendant argued that jeopardy had attached to and he had been acquitted of the assault charge when the State *nol-pros*ed the charge after defendant pled guilty to the abuse charge. Defendant further argued that the trial court improperly vacated the guilty plea to the abuse charge since defendant validly waived his double jeopardy rights to that charge.

4. The Appellate Court rejected defendant’s arguments and held that double jeopardy did not bar retrial on the assault charge. Jeopardy never attached to the assault charge at the plea hearing because defendant never pled guilty to that charge. Instead, the State simply *nol-pros*ed that charge.

Even if jeopardy had attached to the assault charge, the trial court properly vacated

the plea when it realized defendant could not enter a valid plea to the abuse charge since he had been acquitted of that charge. A defendant cannot validly waive the double jeopardy bar on reprosecution following an acquittal.

Defendant's conviction on the assault charge was affirmed.

[Top](#)

§17-5

Reversals on Appeal

People v. Griffith, 404 Ill.App.3d 1072, 936 N.E.2d 1174, 2010 WL 3834444 (1st Dist. 2010)

The Double Jeopardy Clause bars retrial as a result of prosecutorial misconduct only when the prosecutor intends to goad the defendant to seek a mistrial, not where defendant's conviction is reversed on appeal due to the misconduct of the prosecutor.

On direct appeal, the Appellate Court found the egregious misconduct of the prosecutor harmless and affirmed defendant's conviction. A federal district court granted habeas relief, concluding that reversal was automatic because the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. The State did not appeal the district court's judgment, but sought to retry defendant. Defendant unsuccessfully moved to bar retrial, asking the court to interpret the state constitutional double jeopardy provision to bar retrial when intentional and systematic prosecutorial misconduct deprives the defendant of fundamental fairness at trial, regardless of whether the prosecutor intended to or did provoke a mistrial.

The Appellate Court recognized that states may provide broader double jeopardy protection than is afforded by the federal constitution, and that some states have done so. As a lower court, however, the Appellate Court did not have the authority to depart from Illinois Supreme Court precedent.

Moreover, the interests protected by the Double Jeopardy Clause would not be served by barring defendant's retrial. The Double Jeopardy Clause prohibits the State from making repeated attempts to convict defendant, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty. Even though the prosecutor's misconduct was intentional and systematic, any embarrassment, expense or ordeal suffered by defendant on account of a retrial is not due to the vast resources of the State, but rather the overwhelming evidence of guilt. The due process rights of the defendant will be adequately protected by a retrial.

The Appellate Court affirmed the denial of the motion to bar prosecution.

[Top](#)

§17-6

Successive Prosecutions

Yeager v. U.S., ___ U.S. ___, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009)

1. Under **Ashe v. Swenson**, 397 U.S. 436 (1970), an issue of ultimate fact that has

been determined by a valid and final judgment of acquittal cannot be relitigated in a second trial for a separate offense. To determine what issues the acquittal necessarily decided, courts should examine the entire record of the prior proceeding including the pleadings, evidence, charge, and other relevant material, to determine whether a rational jury could have grounded the acquittal on an issue other than that which the defendant seeks to foreclose from consideration in a second trial.

2. Where the defendant was acquitted of fraud in the first trial, but the jury could not reach a verdict on insider trading and money laundering counts, a second trial would be precluded only if the acquittal for wire fraud necessarily involved determination of an issue that was necessary to obtain a conviction on the remaining charges. The court stressed that only the issues required for the acquittal were in question – the jury’s inability to reach a verdict on some counts is a “nonevent” in terms of precluding issues from being considered at the second trial. In other words, “the consideration of hung counts has no place in the issue-preclusion analysis.”

3. Because the lower court did not consider whether the acquittal for fraud necessarily rested on an issue which would be required to convict at a second trial for inside trading and money laundering, the cause was remanded for further consideration.

People v. Brown, 2015 IL App (1st) 134049 (No. 1-13-4049, 6/22/15)

Defendant was prosecuted in separate trials on charges arising from a 2007 gun battle which defendant initiated with three persons. At the first trial, defendant was convicted of aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm for shooting at Terrell Spencer, and was also convicted of two counts of aggravated discharge of a firearm for shooting in the direction of Michael Dixon and Jarrett Swift. However, defendant was granted a directed verdict on charges of attempt murder, aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm relating to the shooting of Mycal Hunter, a bystander who was struck in the neck by a bullet. The trial court stated that there was insufficient evidence to show that defendant fired the shots which struck Hunter.

After the first trial was completed, Hunter died. Defendant was then tried for first degree murder based on two counts of knowing murder and five counts of felony murder predicated on the five felony convictions which he received in the first trial for offenses committed against Spencer, Dixon and Swift.

The court rejected arguments that double jeopardy and collateral estoppel barred a trial for murder after defendant was acquitted in the first trial of offenses against the same person.

1. The Illinois and Federal constitutions provide that no person shall be put twice in jeopardy for the same offense. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Entry of a directed verdict is an “acquittal” for double jeopardy purposes where the basis for the verdict is insufficient evidence to establish some or all of the essential elements of the crime.

Illinois statutory law also provides that a prosecution is barred if the defendant was formerly prosecuted for the same offense based on the same facts and the prior prosecution resulted in an acquittal or a determination that the evidence was insufficient to warrant a conviction. 720 ILCS 5/3-4(a)(1). A prosecution for a different offense is barred where a former prosecution was for an offense that involved the same conduct unless each prosecution requires proof of a fact not required for the other or “the offense was not consummated when the former trial began.” 720 ILCS 5/3-4(b)(1).

The court held that §3-4(b)(1) embodies an exception to double jeopardy principles

recognized in **Diaz v. United States**, 223 U.S. 442 (1912), where the United States Supreme Court found that a subsequent trial is permissible where at the time of the first trial, the prosecution could not have proceeded on the charge brought in the subsequent trial because additional facts necessary to sustain that charge had not yet occurred.

Because a murder prosecution cannot commence until the victim's death has occurred, the court concluded that the **Diaz** exception and §3-4(b)(1) applied. Thus, double jeopardy was not violated where defendant was prosecuted for murder after the decedent's death although he had been acquitted of related offenses at a trial which occurred while the decedent was still alive.

2. In a criminal context, collateral estoppel is a component of double jeopardy. The collateral estoppel doctrine holds that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a subsequent lawsuit. A party who seeks to invoke collateral estoppel must show that the issue was raised and litigated in a prior proceeding, determination of the issue was a critical and necessary part of the final judgment in that proceeding, and the issue sought to be precluded in the later trial is the same as the issue decided in the prior trial. Where the defendant claims that a previous acquittal bars a subsequent prosecution for a related offense, the collateral estoppel rule requires a court to examine the record of the prior proceeding and determine whether a rational jury could have grounded its verdict on an issue other than the one which the defendant seeks to foreclose from consideration.

A directed verdict in favor of the defendant constitutes an "acquittal" where the verdict was based on a finding that there was insufficient evidence concerning an essential element of the crime. Thus, the directed verdict in the first trial has preclusive effect under the collateral estoppel doctrine to the extent that it represented a determination that there was insufficient evidence to sustain an element of a charged offense.

Because intent to kill is an element of attempt murder, the directed verdict on attempt murder in the first trial precluded relitigation concerning whether defendant intended to kill the decedent. Thus, in the second trial the State was estopped from prosecuting defendant for intentional first degree murder.

The acquittal for attempt murder did not preclude a subsequent prosecution for first degree murder based on knowledge that the shooting created a strong probability of death or great bodily harm. However, such charges could not be brought in the second trial because in the first trial, defendant was acquitted of charges (aggravated battery, aggravated battery of a firearm, and aggravated discharge of a firearm) which required a knowing mental state and which were directed toward Hunter. Because the acquittals on these offenses were based on the trial court's finding that there was insufficient evidence to show that defendant knowingly caused Hunter's injuries, the collateral estoppel doctrine precluded a subsequent prosecution for knowing murder.

However, the acquittals for attempt murder and offenses based on knowledge did not preclude a subsequent prosecution for felony murder predicated on the convictions obtained in the first trial against persons other than Hunter. Felony murder does not require a particular mental state, but only that the defendant was committing a forcible felony when he committed the acts which resulted in death. Furthermore, under the Illinois "proximate cause" theory, liability for felony murder attaches for any death which proximately results from unlawful activity initiated by the defendant, even if the killing was performed by the intended victim of the crime. Thus, where defendant was convicted of five felonies for initiating a shootout with individuals other than Hunter, and Hunter died in the course of those felonies, defendant could be prosecuted for felony murder whether or not he fired the

shot which hit Hunter.

3. The court noted, however, that the single act of shooting Hunter could not support three separate felony murder convictions. The court vacated two counts of felony murder, affirmed the conviction for felony murder predicated on aggravated battery with a firearm directed against Spencer, and remanded the cause for re-sentencing.

People v. Cordero, 2012 IL App (2d) 101113 (No. 2-10-1113, 2/10/12)

The double jeopardy clause prohibits a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction, and multiple prosecutions for the same offense. However, double jeopardy protection is triggered only if there has been an event which terminates the original jeopardy from the first proceeding. The original jeopardy is not terminated where the jury fails to reach a verdict at the first trial, or the defendant is convicted but the trial court grants a new trial due to trial error:

[W]here the trial court sets aside a conviction, based on trial error, double jeopardy does not bar retrying the defendant – regardless of whether the evidence at the first trial was legally sufficient. Whatever the strength of the evidence at the original trial, the new trial cannot put the defendant in jeopardy for a *second* time – for the simple reason that he is still in jeopardy for the *first* time.

Where the defendant was convicted of aggravated sexual assault, but the trial court granted defendant's post-trial motion and ordered a new trial, the original jeopardy was not terminated. Therefore, a new trial would not subject the defendant to double jeopardy even if the evidence at the first trial was legally insufficient. Therefore, the trial court properly denied defendant's motion to dismiss the charge on the ground that the evidence presented at the first trial was insufficient to satisfy the reasonable doubt standard.

People v. Guillen, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The trial court was in the process of accepting defendant's guilty plea and determining what sentence to impose (more or less at the same time), when the State decided that it had charged the wrong offense. The court allowed the State to *nolle pros* the current charges over defendant's objection.

When the State brought new charges, defendant moved to dismiss them on double jeopardy grounds, arguing before a new judge that the prior judge had implicitly accepted the guilty plea by discussing sentencing factors and thus jeopardy had attached. The new judge agreed and dismissed the charges.

The State appealed the trial court's dismissal. Defendant was not represented by counsel on appeal and filed no appellate brief responding to the State's arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split three ways on the rationale for doing so with no controlling opinion. The court decided 2-1 to reverse the trial court, again with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee's brief; or (3) the court may reverse the judgment below if the appellant's brief demonstrates *prima facie* reversible error and the record supports the appellant's

contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court. Writing for herself alone, she selected the second **Talandis** option and determined that the trial court had improperly dismissed the charges on double jeopardy grounds.

Double jeopardy is violated by a second proceeding when the defendant was placed in jeopardy during the first proceeding and the first proceeding was improperly terminated. When the State *nol prosses* charges, a second prosecution is permitted if the *nol pros* occurred before jeopardy attached. If the *nol pros* occurs after jeopardy has attached, the *nol pros* generally acts as an acquittal that bars further prosecution.

In a guilty plea, jeopardy attaches when the court accepts the plea, but Illinois law has not clearly defined the point when a guilty plea has been accepted. In particular, the Illinois Supreme Court has not decided whether a trial court has accepted a plea when it has begun to accept the plea but then vacates the plea during the same hearing.

Substantial authority from other jurisdictions, however, suggests that a plea is accepted only when the trial court unconditionally accepts the plea. Thus, a trial court may vacate a guilty plea if it becomes aware of facts counseling against the plea, so long as the plea has not been accepted in a final and unconditional manner.

Based on these principles, Justice Schostok found that jeopardy had not attached when the State *nol prossed* the charges. Although defendant indicated that he wished to plead guilty, and the court admonished him about some of the consequences of his plea and began considering sentencing matters, other aspects of plea acceptance were not present here. The parties still had not agreed on the minimum punishment defendant faced and the State had not presented a factual basis. The plea hearing thus had not concluded when the State *nol prossed* the charges. Any acceptance of the plea was preliminary rather than unconditional.

Even if jeopardy had attached, the prosecution was not improperly terminated. During the plea hearing, both the State and the court realized that defendant had been improperly charged. The State's decision to *nol pros* the charges thus was not for an improper purpose and the court could properly terminate the plea proceedings, vacate the plea, and grant the State's motion without violating double jeopardy.

The trial court's dismissal of the charges was reversed.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok's use of the second **Talandis** option. Instead, Justice Zenoff selected the third **Talandis** option and determined that the appellant's brief showed *prima facie* reversible error.

The State argued that Supreme Court Rule 402 requires the trial court to comply certain formalities before accepting a plea. The record showed that the court did not comply with those formalities and thus the State argued that the trial had not yet accepted defendant's plea. Justice Zenoff found that this argument made a *prima facie* showing that no double jeopardy violation occurred here. Under the third **Talandis** option, that was enough to reverse the trial court's dismissal.

3. Justice Hudson dissented from the judgment reversing the trial court. He selected the first **Talandis** option and, acting as an advocate for defendant, would have found that the trial court properly dismissed the charges on double jeopardy grounds. The record showed that the trial court was beginning to pronounce sentence and therefore had already accepted the guilty plea. Jeopardy had thus attached and the trial court properly dismissed the new charges on double jeopardy grounds.

1. The double jeopardy clause provides protection against: (1) a second prosecution after an acquittal; (2) a second prosecution after a conviction; and (3) multiple punishments for the same offense. If double jeopardy protection has attached, a defendant may not be subjected to a second prosecution after a court-decreed acquittal, even if the acquittal was based on erroneous grounds. Thus, double jeopardy has been held to prevent second prosecutions where acquittals were based on the court's mistaken understanding of the evidence necessary to sustain a conviction or the statute defining the requirements for a conviction.

2. Defendant was charged with unlawful possession of a controlled substance and four counts of unlawful use of a weapon for knowingly possessing firearms or firearm ammunition after having been convicted of a felony. (720 ILCS 5/24-1.1(a)). All of the U UW counts were based on the same prior felony conviction. Counts IV and VI were based on possession of a firearm, and Counts V and VII were based on possession of the ammunition inside that firearm.

Counts IV and V also contained a notice that, pursuant to 720 ILCS 5/24-1.1(e), the State would seek enhanced sentencing because at the time of the offense, defendant was on parole or mandatory supervised release. Section 24-1.1(e) provides that a violation of §24-1.1(a) by a person who is on parole or mandatory supervised release constitutes a Class 2 felony carrying a sentence of not less than two years or more than 14 years if a prison sentence is imposed.

At the end of the trial, the trial court entered an acquittal on Counts IV and V, finding that the State had failed to prove beyond a reasonable doubt that defendant was a parolee. At the sentencing hearing for the remaining counts, the State asked the trial judge to "revisit" the acquittal because defendant's status as a parolee was a sentencing enhancement that need not be proven at trial. The trial court agreed and "revised" its findings to enter convictions on all four U UW counts.

On appeal, the State conceded that double jeopardy principles prevented the trial court from "revisiting" the acquittals, and that the convictions on Counts IV and V must be vacated. The Appellate Court also concluded that on resentencing for the two counts of U UW on which the trial court had not entered acquittals, the trial court was precluded from imposing enhanced sentences based on defendant's parole status. The Appellate Court found that the trial court had acquitted defendant of the Class 2 offense of unlawful use of a weapon based on his status as a parolee, and that allowing the State to apply the same factor to the remaining counts would amount to a second prosecution even if the acquittal was based on a misunderstanding of the law.

The court stressed that it was not deciding whether the defendant's parole status is an "element" of Class 2 unlawful use of a weapon and, if so, whether that element must be proven at trial. Instead, the basis of the holding was that once the trial court entered an acquittal due to the State's failure to satisfy the reasonable doubt standard, the State was precluded from revisiting that issue for related counts of U UW on which acquittals had not been entered.

(Defendant was represented by Assistant Defender Michael Gomez, Chicago.)

People v. Taylor, 2013 IL App (2d) 110577 (Nos. 2-11-0577 & 2-11-0582 cons., 2/21/13)

The prohibition against double jeopardy is of both statutory and constitutional dimension. U.S. Const. Amend. V, XIV, Ill. Const. 1970, Art. I, §10, 720 ILCS 5/3-4(a)(1). The prohibition against double jeopardy protects citizens against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.

When defendants failed to appear on their court dates, the court granted the State's

request for forfeiture of their bonds and issued warrants for their arrest. Ultimately, the court entered judgment on the bond forfeitures. The circuit court denied defendant's motions to dismiss the underlying criminal charges on the ground that their prosecutions were barred by double jeopardy because the bond forfeiture judgments constituted convictions and/or punishment.

A bond forfeiture judgment is a civil judgment. 725 ILCS 5/110-7(g). Upon entry of a bond forfeiture judgment, the obligation of a defendant becomes a debt of record as a civil liability. It is separate and distinct from the criminal offense of violation of a bail bond. Because bond forfeiture judgments are civil, they do not constitute criminal convictions that bar a second prosecution.

A bond forfeiture judgment can be employed as aggravation to enhance a future punishment. Enhancement of a future punishment not based on the transaction upon which the bond forfeiture arose is not punishment. The enhancement of a sentence for a subsequent conviction is not punishment for purposes of double jeopardy.

Because the bond forfeiture judgments constitute neither convictions nor punishment, the circuit court properly denied defendants motions to dismiss on double jeopardy grounds. (Defendants were represented by Assistant Defender Sherry Silvern, Elgin.)

[Top](#)

§17-7

Dual Sovereignty

[Top](#)

§17-8

Increasing Punishment or Charge

People v. Brexton, 405 Ill.App.3d 989, 939 N.E.2d 1076 (2d Dist. 2010)

1. Under **Blackledge v. Perry**, 417 U.S. 21 (1974), due process is not violated by the mere fact that the sentence is increased upon retrial after a successful appeal. Instead, due process prohibits only an increased sentence that appears to have been motivated by a realistic likelihood of vindictiveness. Under **People v. Walker**, 84 Ill.2d 512, 419 N.E.2d 1167 (1981), there is a presumption of vindictiveness where, in the absence of new evidence or changed circumstances, the prosecutor brings additional, more serious charges after a defendant invokes a right to which the law entitles him. The State must rebut the presumption by presenting objective facts showing that the decision to bring the more serious charges was not motivated by vindictiveness.

2. The prosecution failed to rebut the presumption that it acted vindictively by adding a new burglary charge after defendant successfully sought to withdraw his plea to one count of retail theft. In a jury trial, defendant was convicted of the new burglary charge and of the original counts of retail theft.

The court noted that the burglary charge was based on the same act of shoplifting as the retail theft count, and that the State was aware of the facts supporting both charges when it elected to charge only retail theft. The court also rejected several arguments by the State to show that the decision to add the burglary charge was not vindictive.

First, although the prosecutor claimed that he had agreed to dismiss an unrelated retail theft charge in return for the plea in this case, the State did not attempt to reinstate the unrelated charge, as it would have been entitled to do if defendant had sought to withdraw a negotiated plea. Instead, it added a more serious charge which stemmed from the incident for which defendant pleaded guilty.

Second, the prosecutor claimed to have been contemplating whether to add the burglary charge when defendant entered the guilty plea. However, he did not claim to have communicated that possibility to defendant or defense counsel before the plea was entered. To the contrary, the defense was informed of the possibility of a burglary charge only after the case was remanded, when the prosecutor sent a letter to defense counsel stating that a burglary charge would be considered if defendant was successful in withdrawing his plea.

Third, a lack of vindictiveness was not suggested by the fact that the State dismissed a second, less serious retail theft charge when defendant pleaded guilty. The trial court noted at the time of the plea that the one-act, one-crime doctrine precluded convictions on more than one count, and that defendant was entering what was in effect a blind plea. Even had the State dismissed the lesser count as part of a plea agreement, however, its remedy would have been to reinstate the dismissed count rather than to add a more serious charge carrying a higher sentence.

The court stressed that the State did not claim that new evidence or changed circumstances justified the more serious charge. Instead, the only change was that defendant had withdrawn his plea. Because the State failed to rebut the presumption of vindictiveness, defendant's burglary conviction was vacated and the cause remanded for sentencing on retail theft.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

[Top](#)

§17-9 Forfeitures and Civil Sanctions

[Top](#)